

1 Walker F. Crowson (#032021)  
2 SNELLM & WILMER L.L.P.  
3 One East Washington Street, Suite 2700  
4 Phoenix, Arizona 85004-2202  
5 Telephone: 602.382.6000  
6 Facsimile: 602.382.6070  
7 wcrowson@swlaw.com

8 Jason C. Schwartz (*pro hac vice*)  
9 Molly T. Senger (*pro hac vice*)  
10 David A. Schnitzer (*pro hac vice*)  
11 Matt Gregory (*pro hac vice*)  
12 Gibson, Dunn & Crutcher LLP  
13 1050 Connecticut Avenue, NW  
14 Washington, D.C. 20036-5306  
15 Telephone: 202.955.8500  
16 Facsimile: 202.467.0539  
17 jschwartz@gibsondunn.com  
18 msenger@gibsondunn.com  
19 dschnitzer@gibsondunn.com  
20 mgregory@gibsondunn.com

21 *Attorneys for Defendant*  
22 *Lowe's Home Centers, LLC*

14  
15 IN THE UNITED STATES DISTRICT COURT  
16 FOR THE DISTRICT OF ARIZONA  
17

18 Justin Downing, individually and on  
19 behalf of all others similarly situated,

20 Plaintiff,

21 v.  
22 Lowe's Home Centers, LLC, a North  
23 Carolina corporation, and First Advantage  
24 Corporation, a Delaware corporation,

25 Defendants.

26 No. 3:22-cv-08159-SPL

27 **LOWE'S HOME CENTERS, LLC'S  
28 OPPOSITION TO PLAINTIFF'S  
MOTION FOR CERTIFICATION  
OF FED. R. CIV. P. 54(B)  
JUDGMENT**

29 Assigned to Hon. Steven P. Logan

Snell & Wilmer  
L.L.P.  
LAW OFFICES  
One East Washington Street, Suite 2700  
Phoenix, Arizona 85004  
602.382.6000

1  
2 **Table of Contents**  
3

	Page
INTRODUCTION.....	1
ARGUMENT.....	1
I.    A Rule 54(b) Judgment Will Not Promote Judicial Efficiency. ....	2
II.    There Is No Equitable Justification For An Early Appeal. ....	3
CONCLUSION .....	4

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Snell & Wilmer  
L.L.P.  
LAW OFFICES  
One East Washington Street, Suite 2700  
Phoenix, Arizona 85004  
602.382.6000

1  
2  
3     **Table Of Authorities**2     **Page(s)**3     **CASES**

4 <i>Alexander v. City of Mesa,</i> 5     No. 2:14-cv-00754-SPL, 2015 WL 13655444 (D. Ariz. Nov. 6, 2015).....	1, 2, 4
6 <i>Frank Briscoe Co. v. Morrison-Knudsen Co.,</i> 7     776 F.2d 1414 (9th Cir. 1985) .....	2
8 <i>Fuller v. Lopez,</i> 9     No. 2:19-cv-05818-DWL-CDB, 2022 WL 20032604 (D. Ariz. July 13, 2022) .....	1, 4
9 <i>Gausvik v. Perez,</i> 10    392 F.3d 1006 (9th Cir. 2004) .....	1
10 <i>Morrison-Knudsen Co., Inc. v. Archer,</i> 11    655 F.2d 962 (9th Cir. 1981) .....	2
12 <i>Murray v. Mayo Clinic,</i> 13    No. 2:14-cv-01314-SPL, 2017 WL 5989042 (D. Ariz. June 8, 2017) .....	3
13 <i>Pakootas v. Teck Cominco Metals, Ltd.,</i> 14    905 F.3d 565 (9th Cir. 2018) .....	2
15 <i>Smith as Tr. for Bos. Chicken v. Andersen,</i> 16    No. 2:01-cv-0218-PGR, 2005 WL 8160702 (D. Ariz. Jan. 27, 2005).....	2
16 <i>Texaco, Inc. v. Ponsoldt,</i> 17    939 F.2d 794 (9th Cir. 1991) .....	2

17     **RULE**

18    Fed. R. Civ. P. 54(b).....	1, 2, 3, 4
----------------------------------	------------

19     **OTHER AUTHORITIES**

20 <i>Moore's Fed. Practice</i> § 54.23[1][b], [3].....	3
21    U.S. Courts, <i>Federal Court Management Statistics—Summary,</i> 22    March 2023, <a href="https://tinyurl.com/3m6jutme">https://tinyurl.com/3m6jutme</a> .....	3

## 1 INTRODUCTION

2 Plaintiff Justin Downing brought this putative class action alleging separate  
 3 violations of the Fair Credit Reporting Act by Lowe's Companies, Inc. ("Lowe's") and First  
 4 Advantage Corp. ("First Advantage"). In the Lowe's Claims (Counts I and II), he  
 5 challenged the sufficiency of the background check disclosure provided to Downing (and  
 6 putative class members) in the course of applying for employment with Lowe's. *See* First  
 7 Am. Compl. (ECF No. 11) ¶¶ 49–73. The First Advantage Claims (Counts III and IV)  
 8 challenged the propriety of the processes used by First Advantage in preparing background  
 9 reports, in particular the handling of Arizona state convictions that had been "set aside." *Id.*  
 10 ¶¶ 74–109. First Advantage moved to dismiss or strike only the class portion of First  
 11 Advantage Claims. ECF No. 15. Lowe's moved to dismiss the Lowe's Claims in their  
 12 entirety. ECF No. 18. The Court denied First Advantage's motion on June 8, 2023 (ECF  
 13 No. 28), and the First Advantage Claims are proceeding to discovery. On June 20, 2023,  
 14 the Court granted Lowe's motion to dismiss in full, relying on controlling Ninth Circuit  
 15 case law to conclude that "the Disclosure in this case complied with the [FCRA] standalone  
 16 requirement and was clear and conspicuous." ECF No. 29 at 6. Plaintiff has now requested  
 17 that the Court deviate from the standard course and enter a Rule 54(b) judgment to allow  
 18 an immediate appeal of that dismissal. ECF No. 31 ("Mot."). His motion should be denied  
 19 because he cannot demonstrate that this a "special case that warrants an immediate appeal  
 20 from a partial resolution of the lawsuit." *Alexander v. City of Mesa*, No. 2:14-cv-00754-  
 21 SPL, 2015 WL 13655444, at \*1 (D. Ariz. Nov. 6, 2015) (Logan, J.) (denying Rule 54(b)  
 22 judgment) (internal quotation marks omitted).

## 23 ARGUMENT

24 The Ninth Circuit has "repeatedly admonished that 'Rule 54(b) should be used  
 25 sparingly.'" *Fuller v. Lopez*, No. 2:19-cv-05818-DWL-CDB, 2022 WL 20032604, at \*3  
 26 (D. Ariz. July 13, 2022) (quoting *Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir.  
 27 2004)). This Court has similarly recognized that judgment under Rule 54(b) is "generally  
 28 disfavored," and consequently "should be employed with great circumspection."

1 *Alexander*, 2015 WL 13655444, at \*1 (internal quotation marks omitted). The rare case  
 2 that merits such treatment must clear several hurdles. As a threshold matter, there must be  
 3 an “ultimate disposition” of the claims for which a judgment is sought.<sup>1</sup> Then the moving  
 4 party has the burden of showing that “this is one of those exceptional cases where the  
 5 pressing needs of a litigant demands accelerated final adjudication as a matter of equity.”  
 6 *Alexander*, 2015 WL 13655444, at \*2. Or, in the words of the Ninth Circuit, there must be  
 7 “pressing needs of the litigants for an early and separate judgment” that “outbalanc[e]” “the  
 8 costs and risks of multiplying the number of proceedings and of overcrowding the appellate  
 9 docket.” *Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985)  
 10 (quoting *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981)). But  
 11 Downing cannot demonstrate either that there is a judicial efficiency to be gained by an  
 12 immediate appeal (the “judicial administration” prong of the inquiry), or that there is  
 13 sufficient equitable justification for deviating from the standard final-judgment rule (the  
 14 “equitable” prong). Thus the Court should deny the motion.

### 15 I. A Rule 54(b) Judgment Will Not Promote Judicial Efficiency.

16 The “judicial administration” prong of the Rule 54(b) inquiry addresses whether  
 17 entering a partial final judgment will “streamline the ensuing litigation” or “aid expeditious  
 18 decision of the case.” Mot. 5 (citations omitted). To be sure, an immediate appeal would  
 19 hasten the final resolution of the *Lowe’s Claims*—but that is always true with a motion for  
 20 a Rule 54(b) judgment, which is by definition related to a subset of the case. The relevant  
 21 question is whether a Rule 54(b) judgment will streamline resolution of “the case” as a  
 22 whole. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991). The answer here is  
 23 “no.” This is not a situation, for example, in which an appeal might resolve a question that  
 24 would short-circuit or simplify the resolution of the remaining claims, and thus preserve  
 25

---

26 <sup>1</sup> Lowe’s agrees there has been an “ultimate disposition” of the claims against it. See Mot.  
 27 3–4; *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018). But that  
 28 “alone is not a sufficient condition for the Court to enter a 54(b) judgment.” *Smith as Tr. for Bos. Chicken v. Andersen*, No. 2:01-cv-0218-PGR, 2005 WL 8160702, at \*11 (D. Ariz. Jan. 27, 2005).

1 judicial resources. To the contrary, the overwhelming likelihood is that any appeal would  
 2 have little bearing on the remaining claims, all of which are against First Advantage.  
 3 Substantively, as Plaintiff agrees, the issues presented by the Lowe's Claims and the First  
 4 Advantage Claims are largely distinct from one another. *See* Mot. 4 (“The claims are  
 5 therefore independent of each other” and “rest on entirely separate legal theories and  
 6 facts.”).

7 Further, it is quite likely the First Advantage Claims will be resolved—or close to  
 8 resolved—in this Court before the Ninth Circuit will decide any appeal on the Lowe's  
 9 Claims. Thus, even if Downing is correct about the Lowe's Claims (Lowe's believes he is  
 10 not) and the Ninth Circuit reverses this Court and remands for discovery (Lowe's believes  
 11 it will not), there will be no savings of resources: the Court, First Advantage, and Downing  
 12 will still have to proceed with the First Advantage claims in the interim.

13 Indeed, allowing piecemeal appeals in this case would increase the overall burden  
 14 for the Ninth Circuit, which does not need additional work: it had 7,302 cases pending as  
 15 of March 31, 2023, and the highest median time from filing to disposition of the twelve  
 16 regional circuit courts. Admin. Office of U.S. Courts, *Federal Court Management*  
 17 *Statistics—Summary, March 2023*, <https://tinyurl.com/3m6jutme>. That is the *opposite* of an  
 18 “identifiable judicial administrative interes[t] [that] would be served by an immediate  
 19 appeal.” *Moore's Fed. Practice* § 54.23[1][b].

20 **II. There Is No Equitable Justification For An Early Appeal.**

21 A party requesting a Rule 54(b) judgment “should be required to make an affirmative  
 22 showing of the hardship or injustice that would result if judgment is not entered.” *Moore's*  
 23 at 54.23[1][b], [3]. Downing has not identified any such “harsh or unjust result that would  
 24 occur by following the ordinary course of appeal.” *Murray v. Mayo Clinic*, No. 2:14-cv-  
 25 01314-SPL, 2017 WL 5989042, at \*2 (D. Ariz. June 8, 2017) (Logan, J.) (denying Rule  
 26 54(b) motion).

27 The only rationale offered by Downing to support a Rule 54(b) order is a vaguely  
 28 stated concern that Lowe's claims will “stagnate” while he awaits final judgment of the

1 First Advantage Claims, positing broadly that evidence may become less available in the  
 2 interim. Mot. 5, 6. But that is a generic argument that would apply in virtually every  
 3 situation in which a portion of the case is dismissed and others proceed—something that  
 4 occurs every day in federal courts. Such “routine” “partial adjudication” of a case does not  
 5 constitute “genuine risk of legal prejudice” justifying a Rule 54(b) judgment. *Alexander*,  
 6 2015 WL 13655444, at \*2.

7 Nor is this a situation in which delay “would inflict severe financial harm.” *Fuller*,  
 8 2022 WL 20032604, at \*3 (internal quotation marks omitted). Downing primarily requests  
 9 “statutory damages of not less than \$100 and not more than \$1,000,” ECF No. 11 ¶¶ 58,  
 10 71, with a secondary request for “actual” damages unsupported by any facts suggesting any  
 11 exist. *See* ECF No. 18 at 15–17.

## 12 CONCLUSION

13 Downing was free to bring the First Advantage Claims and Lowe’s Claims in  
 14 separate suits. As a consequence of Downing’s strategic choice to bring these claims in the  
 15 same suit, there was the potential (now realized) that the claims would be resolved at  
 16 different times, and a wait required before a singular trip to the Ninth Circuit for the parties.  
 17 Nothing about that outcome is unusual or unfair. This is not “the special case that warrants  
 18 an immediate appeal from a partial resolution of the lawsuit.” *Alexander*, 2015 WL  
 19 13655444, at \*1. The Court should deny Downing’s motion for entry of a Rule 54(b)  
 20 judgment on the Lowe’s Claims.

Snell & Wilmer  
 L.L.P.  
 LAW OFFICES  
 One East Washington Street, Suite 2700  
 Phoenix, Arizona 85004  
 602.382.6000

1 RESPECTFULLY SUBMITTED this 14th day of July, 2023.

2 /s/ Walker F. Crowson

3 Walker F. Crowson (#032021)  
4 SNELL & WILMER L.L.P.  
5 One East Washington Street, Suite 2700  
6 Phoenix, Arizona 85004-2202  
7 Telephone: 602.382.6000  
8 Facsimile: 602.382.6070  
9 wcrowson@swlaw.com

10 /s/ Jason C. Schwartz

11 Jason C. Schwartz (*pro hac vice*)  
12 Molly T. Senger (*pro hac vice*)  
13 David A. Schnitzer (*pro hac vice*)  
14 Matt Gregory (*pro hac vice*)  
15 Gibson, Dunn & Crutcher LLP  
16 1050 Connecticut Avenue, NW  
17 Washington, D.C. 20036-5306  
18 Telephone: 202.955.8500  
19 Facsimile: 202.467.0539  
20 jschwartz@gibsondunn.com  
21 msenger@gibsondunn.com  
22 dschnitzer@gibsondunn.com  
23 mgregory@gibsondunn.com

24 *Attorneys for Defendant Lowe's Home Centers, LLC*

25 Snell & Wilmer  
26 L.L.P.  
27 LAW OFFICES  
28 One East Washington Street, Suite 2700  
29 Phoenix, Arizona 85004  
30 602.382.6000

## CERTIFICATE OF SERVICE

I certify that I caused the attached document to be filed with the Clerk's Office using the CM/ECF System, and transmittal of a Notice of Electronic Filing to be sent to the following CM/ECF Registrants, and a copy of the same to be mailed to the following if non-registrants on this 14th day of July, 2023:

Penny L. Koepke  
MAXWELL & MORGAN, P.C.  
4854 E. Baseline Rd., Suite 104  
Mesa, Arizona 85206  
[pkoepke@hoalow.biz](mailto:pkoepke@hoalow.biz)

Steven L. Woodrow  
Patrick H. Peluso  
Taylor T. Smith  
WOODROW & PELUSO, LLC  
3900 E. Mexico Ave., Suite 300  
Denver, Colorado 80210  
[swoodrow@woodrowpeluso.com](mailto:swoodrow@woodrowpeluso.com)  
[ppeluso@woodrowpeluso.com](mailto:ppeluso@woodrowpeluso.com)  
[tsmith@woodrowpeluso.com](mailto:tsmith@woodrowpeluso.com)

*Attorneys for Plaintiff Justin Downing*

Mandi J. Karvis  
WICKER SMITH O'HARA MCCOY & FORD P.A.  
One N. Central Ave., Suite 885  
Phoenix, Arizona 85004  
mkarvis@wickersmith.com

Henry Chalmers (*admitted pro hac vice*)  
Edward P. Cadagin (*admitted pro hac vice*)  
ARNALL GOLDEN GREGORY LLP  
171 17<sup>th</sup> Street NW, Suite 2100  
Atlanta, Georgia 30363  
[henry.chalmers@agg.com](mailto:henry.chalmers@agg.com)  
[edward.cadagin@agg.com](mailto:edward.cadagin@agg.com)

*Attorneys for Defendant First Advantage Background Services Corporation*

/s/ Jason C. Schwartz

---

Jason C. Schwartz

**Snell & Wilmer**  
LLP.  
LAW OFFICES  
One East Washington Street, Suite 2  
Phoenix, Arizona 85004  
602.382.6000